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No. 88-1023

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,
Petitioner,

vs.

KARL W. CHRISTEY, ET AL.
Respondents.

BRIEF OF KARL W. CHRISTEY AND STEVEN L. PILLSBURY IN OPPOSITION TO THE PETITION OF THE UNITED STATES OF AMERICA FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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BRIEF OF KARL W. CHRISTEY and STEVEN L. PILLSBURY IN OPPOSITION TO THE PETITION OF THE UNITED STATES OF AMERICA FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

Respondents[1] submit the following as an addition to the Statement of the Case found in the Petition for the Writ of Certiorari ("Petition").

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[1] Kathleen M. Christey and Holly L. Pillsbury are also Respondents, solely because they filed joint returns with their spouses, Karl W. Christey and Steven L. Pillsbury, respectively, for the 1981 and 1982 tax years. Reference herein to "Respondents" refers to Karl W. Christey and Steven L. Pillsbury.

The District Court determined that Respondents' expenses for meals while on duty were deductible as "ordinary and necessary" business expenses under the general provision of Section ("§") 162(a) of the Internal Revenue Code ("Code").[2] The trial court based its decision on the facts that Respondents were "subject to a number of duty-related restrictions and requirements concerning their meals while on duty," Petitioner's Appendix ("Pet. App."), 43a, and that their meals were taken "not for the convenience or comfort of Christey and Pillsbury . . . but for the convenience and benefit of the Patrol." Pet. App., 44a.

The Petitioner does not challenge the factual findings of the District Court but

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[2]Code section references herein shall be to the Internal Revenue Code of 1954 (26 U.S.C), unless otherwise noted.

argues that the trial court erred, as a matter of law, in concluding that the taxpayers were entitled to deduct meal costs incurred while on patrol duty under the general provision of § 162(a). At trial, the Petitioner's primary contention was that the meal expenses were not deductible under the specific provisions regarding meals of § 162(a)(2) or excludable under § 119, and thus could not be deducted under the general provision of § 162(a). Pet. App., 6a. The Petitioner did not raise at trial the argument now asserted that § 262, as a matter of law, precludes deductibility of meal expenses under § 162(a).

In addition, Petitioner mischaracterized the opinion of the United States Court of Appeals for the Eighth Circuit ("8th Circuit") as having allowed a deduc-

tion of a personal expense. Petition, 7. Rather, the 8th Circuit held that "under certain limited circumstances, such expenses [the cost of one's meal] may be deducted under the general provision of § 162(a). . . 'when circumscribed by company regulations . . . [give it] the color of a business expense.'" Pet. App., 7a.

The amount of each claim for refund at issue is less than $1,000 for each year in dispute.

REASONS FOR DENYING THE WRIT

I. THE LOWER COURTS ENGAGED IN THE PROPER ANALYSIS IN DETERMINING WHETHER A PARTICULAR EXPENSE IS A BUSINESS EXPENSE OR A PERSONAL EXPENSE.

The fundamental question which Petitioner asks this Court to consider is whether the test for deductibility of a meal expense under § 162(a) is preempted by § 262 or whether an analysis of the

facts and circumstances under which the expense occurred is appropriate. The 8th Circuit correctly affirmed the factual findings of the District Court and properly applied the well-established law on the issue.

Inherent in the tax law is the notion that an analysis of the facts and circumstances at issue is critical to a just determination. The language of Justice Cardozo contained in Welch v. Helvering, 290 U.S. 111 (1933) sets forth this principle:

> Here, indeed, as so often in other branches of the law, the decisive distinctions are those of degree and not of kind. One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle.

Id. at 114-115; see also Commissioner v. Duberstein, 363 U.S. 278, (1960) (the role of the factfinder in tax cases is crucial and should be given great weight). Moreover, this Court recently upheld the general position that the resolution of an issue under § 162(a) requires an examination of the facts in each case and further stated that the basis for the decision was derived from "our concern that an attempt judicially to formulate and impose a test for all situations would be counterproductive, unhelpful, and even somewhat precarious for the overall integrity of the Code." Commissioner v. Groetzinger, 480 U.S. ___, 107 S. Ct. 980, 988 (1987) (construing the phrase "trade or business" within the meaning of § 162(a)). In other words, each case bears its own investiga-

tion and analysis, which the trial court has already undertaken.[3]

A. An Analysis of the Facts is Necessary to Determine Whether an Expense is a Business Expense or a Personal Expense.

A determination of whether an expense is a non-deductible personal expense under § 262 or whether it is a deductible business expense under § 162 requires a factual inquiry. See Commissioner v. Heininger, 320 U.S. 467, 475 (1943); Trust of Bingham v. Commissioner, 325 U.S. 365, 370, (1945); Iowa Southern Utilities Co. v. Commissioner, 333 F.2d 382, 385 (8th Cir.), cert. denied, 379 U.S. 946 (1964) ("whether an expense is ordinary and nec-

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[3] To the extent the Petitioner wishes to impose a new gloss on the interpretation of § 162(a) in order to provide for a total preemption by § 262, the ultimate responsibility for this revision rests with the Congress. Groetzinger, supra, at 988; Flood v. Kuhn, 407 U.S. 258, 269-285 (1972); United States v. Correll, 389 U.S. 299, 307 (1967).

essary and whether it is related to business are doubtless pure questions of fact in most instances"); United States v. General Bancshares, 388 F.2d 184 (8th Cir. 1968).[4]

Petitioner gamely argues that § 262 bars any deductions for meal expenses which possess a dual business and personal character, unless the meal was consumed while away from home, overnight, pursuant to § 162(a)(2). However, Petitioner's assertion is unsupported in the law, because under certain limited circumstances, such expenses may be deduc-

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[4] Under most circumstances, the cost of one's meal is a personal expense and thus non-deductible under § 262, which disallows deductions for personal, living, or family expenses. However, § 262 does not end the factual inquiry, as even the regulations thereto state "except as permitted under § 162, 212, or 217 the costs of the taxpayer's meals not incurred in traveling away from home are personal expenses." Treas. Reg. § 1.262-1(b)(5) (1987) (emphasis added).

tible under the general provision of § 162(a) and "that which may be a personal expense under some circumstances can, when circumscribed by company regulations, directives, and conditions, lose its character as a personal expense and take on the color of a business expense." Sibla v. Commissioner, 611 F.2d 1260, 1262 (9th Cir. 1980). Accord Cooper v. Commissioner, 67 T.C. 870, aff'd sub nom., Sibla v. Commissioner, supra; Walsh v. Commissioner, 52 T.C.M. (CCH) 1344 (1987); Belt v. Commissioner, 47 T.C.M. (CCH) 1433 (1984).[5]

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[5] The list of specific deductions found in § 162(a)(1) through (a)(3) is exemplary only. McCabe v. Commissioner, 688 F.2d 102, 105, n.8 (2d Cir.), cert. denied, 459 U.S. 906 (1982).

B. Petitioner's Preemption Argument Runs Counter to the Case Heavily Relied on by Petitioner, Moss v. Commissioner.

Even the cases relied on by Petitioner do not support its proposition, but rather hold that a balancing relationship exists between § 162(a) and 262. Petitioner argues that the 8th Circuit's decision is inconsistent with Moss v. Commissioner, 758 F.2d 211 (7th Cir.), cert. denied, 474 U.S. 979 (1985), which denied deductions for work-related meal expenses. However, the rationale underpinning the Moss decision is wholly ignored by the Petitioner and, upon even a cursory analysis, reveals that it fully contradicts the Petitioner's position. In short, Moss, supra, specifically required that a factual determination be made in determining whether the cost of one's meal is deductible under § 162 or non-deduct-

ible under § 262. Contrary to Petitioner's position that a taxpayer's meals during working hours cannot, under any circumstances, transform the costs of those meals into deductible business expenses, the Seventh Circuit recognized the possibility of just such a deduction:

> Section 262 of the Internal Revenue Code (Title 26) disallows, 'except as otherwise expressly provided in this chapter,' the deduction of 'personal, family, or living expenses.' . . . and section 162(a) allows the deduction of 'all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . .' . . . The Internal Revenue Service concedes, however, that meals are deductible under section 162(a) when they are ordinary and necessary business expenses . . . <u>even if they are not within the express permission of any other provision</u>. . . .

Id. at 212 (emphasis added)[6]. The Moss court concluded that "It is all a matter of degree and circumstance." Id. at 213.

Now that the IRS has lost a factual determination in the present case based upon the same section of the Code at issue in Moss, supra, it would like the United States Supreme Court to blindly adopt a new black letter rule, namely that § 262, as a matter of law, precludes meal expenses under § 162(a) of the Code. This

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[6] The Commissioner in its brief to the Seventh Circuit in Moss, supra, stated that "the determination whether an expenditure is for personal rather than business purposes is a question of fact subject to the clearly erroneous standard of review," Brief for the Appellee, at 10, precisely the position taken by Respondents herein. The Internal Revenue Service ("IRS") had prevailed at the Tax Court level in Moss, supra, and correctly relied upon the rule of law that a factual determination had been made and could only be reversed pursuant to the clearly erroneous standard. The very position the Petitioner now urges on this Court is flatly contradictory to the correct position it previously took in Moss, supra, on the identical issue of deductibility of meals under § 162(a).

new-found proposal, however, is not a true statement of the law, as a meal can, under some limited circumstances, which were established at trial, constitute an ordinary and necessary expense in carrying on one's business under § 162(a). Although the IRS recently agreed with this position in Moss, supra, it apparently has had a change in heart.[7] It now wishes to convert what has always been a question of fact into a matter of law. This legal pirouette is not only contrary to Petitioner's representations to the Seventh Circuit in

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[7] Indeed, at the trial court proceedings and at the 8th Circuit, the thrust of Petitioner's argument was that, based upon a factual analysis, the facts were insufficient to transform Respondent's meal expenses into business expenses. See, e.g., Brief for the Appellant, at 16-21. The 8th Circuit recognized that the Petitioner only "implicitly raised the argument that § 262 precludes deductibility of meal expenses unless a deduction is specifically provided for." Pet. App., 6a, n.5. In any event, the 8th Cir. addressed Petitioner's evolving theory and rejected it as unfounded and unsupported in the law.

Moss, but is also inconsistent with a long line of Supreme Court and lower court cases that hold that the deductibility of business meals is determined upon a factual analysis. The Petitioner should be foreclosed from having it both ways.

C. The Code Contemplates an Interrelationship Between § 162 and § 262.

As the above discussion reflects, the single provision of § 262 does not answer the inquiry involved in this case. Rather, §§ 262 and 162 work together creating, at best, a presumption that expenses which the general population normally incurs, such as commuting and meal expenses, are personal expenses. In this case the presumption was overcome by Respondents with extensive and extraordinary restrictions imposed upon them by their employer and with other

evidence which converted the expense to a business-related expense.

This interrelationship between § 162 and 262 has long been the law.[8] The Courts have consistently held that the determination of whether an expense is deductible under § 162(a) requires a balancing of §§ 162 and 262. In Pevsner v. Commissioner, 628 F.2d 467 (5th Cir. 1980), the Court held that the cost of designer clothing which the taxpayer wore on her job was not deductible because her employer did not preclude her from wearing the clothing away from work. Rather than holding that § 262 precluded a deduction under § 162(a), as Petitioner argues, the

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[8] The IRS has also internally recognized the balancing relationship between §§ 162 and 262. See IRS Manual Supplement MS 40 RDD-91, Section 1.03 (March 22, 1983) ("The determination of whether an expense is ordinary and necessary to the operation of a business is a factual question"). Respondent's Appendix ("Resp. App."), A-1, A-2.

Fifth Circuit indicated that its determination required

> an examination of the relationship between Section 162(a) of the Internal Revenue Code of 1954, which allows a deduction for ordinary and necessary expenses incurred in the conduct of a trade or business, and Section 262 of the Code, which bars a deduction for all 'personal, living, or family expenses.'

Id. at 469. The Court then applied an objective standard to reach "a reasonable interpretation of Sections 162 and 262." Id. at 471. Most importantly, the Court did not preclude the deduction as a matter of law.

Likewise, in McCabe v. Commissioner, supra, the Second Circuit recognized the interrelationship between §§ 162 and 262 in determining "whether petitioner's additional expenses [in commuting from home to work with a gun] were appropriate, help-

ful, normal and expected under the circumstances or so personal in nature as to be non-deductible under I.R.C. § 262 (1976)." Id. at 105.[9] The Petitioner's position is directly contrary to the balancing between §§ 162 and 262 applied consistently in several circuits.[10] The trial court and the 8th Circuit in this case properly analyzed the issue, and the trial court made a factual determination

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[9] Courts have ruled on several occasions upon the analogous question of whether a payment qualifies as an ordinary and necessary expense deductible under § 162(a) or as a capital expenditure not deductible under § 263(a), and have likewise determined that "§ 162(a) and 263 are not mutually exclusive" but rather depend on the character of the transaction to which they relate. Iowa Southern, supra at 385; see also, General Bancshares, supra.

[10] See, e.g., Moss, supra (7th Cir.); McCabe, supra (2nd Cir.); Alvarado v. Commissioner, 49 T.C.M. (CCH) 967 (1985), aff'd, 781 F.2d 901 (5th Cir. 1986); Commissioner v. Doak, 234 F.2d 704 706 (4th Cir. 1956) ("the issue boils down to whether these expenses were predominately personal or business in nature"); Commissioner v. Moran, 236 F.2d 595 (8th Cir. 1956).

based upon the record before it. The Petitioner cannot now argue in this forum that the well-established balancing test is wrong and should be changed.[11]

D. Deductions Have Been Allowed Under § 162(a) for Expenses With Personal Attributes.

The Petitioner seeks to persuade this Court that a business expense without any personal characteristics can be deducted under the general provisions of § 162(a), whereas the deduction of a business expense which has personal characteristics cannot be so deducted, unless expressly provided elsewhere in the Code. Petition,

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[11] The Petitioner appears to concede, to some degree, that a factual determination is necessary. See Petition, 17: "It remains true that in the absence of unusual circumstances . . . meal costs are personal expenses that may not be deducted under § 162(a)." (emphasis added). Although the Petitioner contends that the unusual circumstances are not present here, this is a factual inquiry and one which has already been answered by the trial court.

8-9. Although the Petitioner is only able to cite the introductory clause of § 262 for authority for this proposition, there are many expenses for which deductions have been allowed under § 162(a) which do have personal attributes and which are not expressly provided for in the Code. For example, the Petitioner cites "the classic example . . . [of] the cost of commuting to and from work" as a personal expense not deductible. Petition, 15. Although commuting expenses are generally considered non-deductible personal expenses, such expenses are deductible, under the general provision of § 162(a), when incurred for business purposes, notwithstanding the absence of any express provision allowing the deduction of a commuting expense in the Code. Ellwein v. United States, 778 F.2d 506 (8th Cir. 1985); see

also, Walraven v. Commissioner, 815 F.2d 1246 (8th Cir. 1987); Kasun v. United States, 716 F.2d 1059 (7th Cir. 1982). Although commuting certainly bears personal attributes, in the rare case, the taxpayer overcomes the burden of proof and incurs the commuting expenses through business necessity, permitting a deduction under § 162(a). Ellwein, supra, at 512.

Likewise, in Sibla, supra, and Cooper, supra, the substantial employer-imposed restrictions in connection with meals gave rise to a § 162(a) deduction for firemen who were required to make payments into an organized mess at their fire station. See also Inman v. Commissioner, 29 T.C.M. (CCH) 1168, 1169 (1970) (park ranger permitted to deduct utility expenses under § 162(a) because of employer-imposed living requirement).

Similarly, the record in the present case demonstrates that Respondents were required to purchase meals they could not eat because of police duties and had other substantial employer-imposed restrictions relating to their meals placed upon them, as previously set forth in the record.

E. The Clearly Erroneous Standard Was Properly Applied.

The District Court's conclusion that the taxpayers' meal expenses qualify as ordinary and necessary business expenses was a factual determination. It is undisputed that the trier of fact's decision will not be set aside unless clearly erroneous. Commissioner v. Duberstein, supra; Commissioner v. Heininger, supra, at 475; Commissioner v. Flowers, 326 U.S. 465, 470 (1946) (a "[T]ax Court's inferences and conclusions on such a factual matter, under established principles,

should not be disturbed by an appellate court.") As recently stated by this Court, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985). Since the District Court's account of the evidence is plausible in light of the record viewed in its entirety, the rule does not allow reversal even if the reviewing Court is convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Id. at 574.[12]

The Petitioner has not challenged, and cannot now challenge, the factual findings of the District Court and is, therefore, bound by them. Specifically,

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[12] The rule itself applies also to factual inferences from undisputed basic facts. Austin v. Commissioner, 298 F.2d 583, 585 (2nd Cir. 1962).

the District Court found that Respondents were entitled to deduct the amounts of their meal expenses while on duty in 1981 and 1982, because they constituted "ordinary and necessary" expenses under § 162(a). In making its determination, the District Court made factual findings based on all of the evidence and circumstances, including the specific restrictions under which Respondents were required to take their meals and upon the events which took place during those meals.[13] The Court made a specific factual

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[13] Although the Petitioner views the job related restrictions as "relatively minor," Petition, 19, an analysis of them, already undertaken by the trial court, indicates that the employer-imposed regulations were at least as restrictive as those imposed in Sibla, supra, and that they were imposed strictly for the convenience of the employer, the State of Minnesota. See Pet. App., 29a-30a, 44a, 47a-48a and Tr. 34, 59 setting forth some examples of the restrictions and the types of restraints placed on Respondents during their on-duty meals.

determination that all of the facts, viewed together, converted Respondents' otherwise personal expenses into business expenses. Pet. App., 43a, 44a. Although there may be another view of the evidence, namely that contended by the Petitioner that the cost of Respondents' meals were personal expenditures, the fact that the District Court, after a thorough analysis, chose the view of the evidence which rendered the expenses deductible is not clearly erroneous. See Anderson v. City of Bessemer City, supra, at 574. Therefore, there is no need to grant the Writ.

II. THE DECISION OF THE 8TH CIRCUIT IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

The Petitioner argues that the decision below cannot be reconciled with this Court's decision in United States v.

Correll, 389 U.S. 299 (1967), a case involving a traveling salesman and § 162(a)(2). Petition, 12. However, neither of the courts below had any difficulty reconciling Correll, supra, because it does not address the universe of issues that arise when a taxpayer consumes meals, and specifically does not address the deductibility of Respondents' meals while on duty under the general provision of § 162(a). The Petitioner even concedes that this Court in Correll, supra, "did not expressly reject the proposition that personal meal expenses can be deducted as ordinary and necessary expenses under the general provision of 162(a)." Petition, 12-13. Indeed, this Court acknowledged, without directly considering, the potential viability of § 162(a) as a basis for deduction of meals

when it later considered a claim for exclusion of meal allowances under § 119 in Commissioner v. Kowalski, 434 U.S. 77, 81, n.9 (1977).

The Petitioner, however, purports to argue that Correll, supra, "rests on the basic principle that the deduction of personal expenses must be expressly authorized by the Code," Petition, 9. However, even § 162(a)(2) which purportedly contains express authorization for the deduction of some personal expenses is not definite, but needs interpretation and factual application just as other sections of the Code so require. This Court, in Correll, supra, recognized that "[t]he language of the statute - 'meals and lodging ... away from home' - is obviously not self-defining." Id. at 304. Consequently, even Correll, supra,

upon which the Petitioner heavily relies, does not defeat Respondents' argument that a factual inquiry is necessary.

III. THE DECISION OF THE 8TH CIRCUIT RELATES TO A PROVISION OF THE 1954 CODE WHICH NO LONGER HAS THE SAME IMPACT, AS IT WAS REVISED BY THE TAX REFORM ACT OF 1986.

Contrary to Petitioner's argument that the decision below "encourages substantial factbound litigation," Petition, 9, the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, severely curtails even the ability to take deductions in the first instance, and, consequently, allays the fears expressed by the Petitioner. Section 132 of the Tax Reform Act amended the Code by adding new section 67 ("§ 67"), Resp. App., B-4. Tax Reform Act § 132(a). § 67 provides:

> In the case of an individual, the miscellaneous itemized deductions for any taxable year shall be allowed only to the extent that the aggregate of

> such deductions exceeds 2 percent of adjusted gross income.

§ 67(a). Thus, in the future, taxpayers will be able to deduct only that amount of their meal expenses (together with their other miscellaneous itemized deductions) that exceed two percent of their adjusted gross income, substantially limiting the amount that a taxpayer may deduct as a miscellaneous itemized deduction.

Moreover, miscellaneous itemized deductions under the Tax Reform Act may be deducted only to the extent that such itemized deductions exceed the amount of the standard deduction to which the taxpayer is entitled. See § 63, Internal Revenue Code of 1986, Resp. App. C. The Tax Reform Act had a major impact on the eligibility of a taxpayer to itemize, because Section 102(a) of the Tax Reform Act, Resp. App., B-1 - B-3, increased the

amount of the standard deduction to $5,000 for married taxpayers beginning in 1988.[14] This is a significant increase over the $3,400 zero bracket amount previously available.

The impact of a larger standard deduction and the two percent floor under miscellaneous itemized deductions is to limit the number of taxpayers who itemize:

> The increases in the standard deduction, modifications to specific deduction provisions, and the floor under itemized deductions will simplify the tax system by substantially reducing the number of itemizers. As a result of these changes, about 13 million itemizers will shift to using the standard deduction, a reduction of approximately 30 percent in the number of itemizers relative to present law.

H.R. Rep. 99-426, 99th Cong., 1st Sess. 88 (1985). Therefore, as a result of the Tax

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[14] The amount of the standard deduction is adjusted for inflation beginning in 1989 and years thereafter.

Reform Act, the spectre of an increasing wave of "factbound litigation" is unfounded.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: January 23, 1989

APPENDIX A

INTERNAL REVENUE SERVICE

MANUAL SUPPLEMENT

MS 40 RDD-91

March 22, 1983

PART IV - Audit and Investigation

CHAPTER:

Direct Sellers of Home Products Study

PURPOSE:

Section 1. Purpose, Scope and Background

* * * *

.03 Subject to certain limitations and substantiation requirements, ordinary and necessary expenses incurred by an individual in carrying on a trade or business are deductible for income tax purposes (Code Sec. 162). The determination

of whether an expense is ordinary and necessary to the operation of a businesss is a factual question.

* * * *

APPENDIX B

PUBLIC LAW 99-514 [H.R. 3838];
October 22, 1986

TAX REFORM ACT OF 1986

* * * *

TITLE I-INDIVIDUAL INCOME TAX PROVISIONS

SUBTITLE A-RATE REDUCTIONS; INCREASE IN STANDARD DEDUCTION AND PERSONAL EXEMPTIONS

* * * *

SEC. 102. INCREASE IN STANDARD DEDUCTION.

(a) GENERAL RULE -- Section 63 (defining taxable income) is amended to read as follows:

"SEC. 63. TAXABLE INCOME DEFINED.

"(a) IN GENERAL.--Except as provided in subsection (b), for purposes of this subtitle, the term 'taxable income' means gross income minus the deductions allowed

by this chapter (other than the standard deduction).

"(b) INDIVIDUALS WHO DO NOT ITEMIZE THEIR DEDUCTIONS.--In the case of an individual who does not elect to itemize his deductions for the taxable year, for purposes of this subtitle, the term 'taxable income' means adjusted gross income, minus--

"(1) the standard deduction, and

"(2) the deduction for personal exemptions provided in section 151.

"(c) STANDARD DEDUCTION.--For purposes of this subtitle--

"(1) IN GENERAL.--Except as otherwise provided in this subsection, the term 'standard deduction' means the sum of--

"(A) the basic standard deduction, and

"(B) the additional standard deduction.

"(2) BASIC STANDARD DEDUCTION.--For purposes of paragraph (1), the basic standard deduction is--

"(A) $5,000 in the case of

"(i) a joint return, or

"(ii) a surviving spouse (as defined in section 2(a)

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SUBTITLE D-PROVISIONS

RELATED TO DEDUCTIONS

* * * *

SEC. 132.2--PERCENT FLOOR ON MISCELLANEOUS ITEMIZED DEDUCTIONS.

(a) GENERAL RULE.--Part I of subchapter B of chapter 1 (defining gross income, adjusted gross income, etc.) is amended by adding at the end thereof the following new section:

"SEC.67.2--PERCENT FLOOR ON MISCELLANEOUS ITEMIZED DEDUCTIONS.

"(a) GENERAL RULE.--In the case of an individual, the miscellaneous itemized deductions for any taxable year shall be allowed only to the extent that the aggregate of such deductions exceeds 2 percent of the adjusted gross income.

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APPENDIX C

26 U.S.C. § 63.

TAXABLE INCOME DEFINED

(a) IN GENERAL.--Except as provided in subsection (b), for purposes of this subtitle, the term "taxable income" means gross income minus the deductions allowed by this chapter (other than the standard deduction).

(b) INDIVIDUALS WHO DO NOT ITEMIZE THEIR DEDUCTIONS.--In the case of an individual who does not elect to itemize his deductions for the taxable year, for purposes of this subtitle, the term "taxable income" means adjusted gross income, minus--

(1) the standard deduction, and

(2) the deduction for personal exemptions provided in section 151.

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